

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

HAROLD W. WRIGHT,)
v.)
Plaintiff,) Case No. 1:17-cv-889
)
) Honorable Phillip J. Green
COUNTY OF MECOSTA, et al.,)
Defendants.)
)

**ORDER GRANTING DEFENDANTS' MOTION
FOR A PROTECTIVE ORDER**

This is a civil action brought by a former inmate at the Mecosta County Jail under 42 U.S.C. § 1983 through counsel. On the afternoon of Friday, September 7, 2018, plaintiff's attorney filed a notice of deposition stating that the deposition of Mr. Patrick Kettner,¹ a non-party, would be taken at 10:00 a.m. on Monday, September 10, 2018. (ECF No. 31, PageID.180). After 3:00 p.m. on Friday afternoon, plaintiff's attorney sent defendants' attorney a revised notice stating that Mr. Kettner's deposition would take place on Monday at 11:00 a.m.² (ECF No. 35-2, PageID.229). On September 7, 2018, at 4:53 p.m., defendants filed the motion for a protective order now before the Court. (ECF No. 32). Defendants' motion for a protective order was pending when plaintiff took Mr. Kettner's deposition on Monday,

¹ The spelling of Mr. Kettner's last name as it appears in his affidavit (Kettner Aff. ¶ 1, ECF No. 35-1, PageID.224) is used herein rather than "Ketner."

² The revised notice (ECF No. 35-2, PageID.227) was never filed before Mr. Kettner's deposition.

September 10, 2018. (ECF No. 35, PageID.220).

Plaintiff filed this lawsuit on October 6, 2017. (ECF No. 1). On May 30, 2018, plaintiff identified Mr. Kettner as a potential witness. (ECF No. 17, PageID.83; ECF No. 35, PageID.219). There is no evidence of any effort by plaintiff to locate Mr. Kettner and preserve his testimony before September 2018. On August 24, 2018, Mr. Kettner advised plaintiff's attorney that he would be leaving the United States in late September or October 2018. Mr. Kettner planned to join the French Foreign Legion and would not be returning to the United States for several years. Plaintiff did not immediately notice Mr. Kettner's deposition and accepted the risk that his travel plans might change. On September 7, 2018, Mr. Kettner advised plaintiff's attorney that he planned to leave the United States on September 11, 2018. (ECF No. 35-1, PageID.224-25).

Rule 32(a)(5)(A) precludes use of a deposition taken on short notice:

Deposition Taken on Short Notice. A deposition must not be used against a party who, having received less than 14 days' notice of the deposition, promptly moved for a protective order under Rule 26(c)(1)(B) requesting that it not be taken or be taken at a different time or place-- and this motion was still pending when the deposition was taken.

FED. R. CIV. P. 32(a)(5)(A). Defendants received less than fourteen days' notice of the deposition. They promptly moved for a protective order and their motion remained pending when plaintiff took Mr. Kettner's deposition. Accordingly,

IT IS ORDERED that defendants' motion for a protective order (ECF No. 32) is **GRANTED** and that plaintiff is precluded from any use of Mr. Kettner's deposition.

Dated: October 10, 2018

/s/ Phillip J. Green
PHILLIP J. GREEN
United States Magistrate Judge